services.[28] Regarding collective offerings, the Commission determined that: "cable operators should be free to offer collective offerings at a combined price which is less than the sum of the charges for the individual services. Such discounts benefit the consumer by making premium channels more affordable and thus more widely available."[29] For this reason, the Commission indicated that collective offerings of premium channels should be encouraged.[30]

3. The Commission Should Evaluate TKR's A La Carte Service Offerings Based upon the Requirements of the May 3, 1993 Rate Order.

TKR restructured its rates effective August 31, 1993 consistent with the requirements of the May 3, 1993 Rate Order. With the A La Carte pronouncements of the Rate Order in mind, TKR initiated restructured A La Carte offerings. In developing new, additional A La Carte service offerings, cable operators were constrained to follow the guidelines furnished by the Rate Order until the effective date of the March 30, 1994 Revised Benchmark Order, which was May 15, 1994.

Applying guidelines later developed by the Commission to A La Carte offerings developed pursuant to

[28]Rate Order, 8 FCC Rcd at 5836, ¶ 327.

[29]Rate Order, 8 FCC Rcd at 5837, ¶ 327.

[30]Rate Order, 8 FCC Rcd at 5837, ¶ 329.

earlier rules is unfair to TKR and clearly constitutes unlawful retroactive ratemaking.[31]

In addition to being unfair to TKR and unlawful as retroactive ratemaking, applying subsequently developed guidelines to TKR's A La Carte offerings runs contrary to the Commission's own regulations and to its March 30, 1994 Third Reconsideration order.[32] Section 76.942(c)(3) of the regulations,[33] regarding refunds which may be ordered by a franchising authority or by the Commission, addresses this exact point. This regulation provides: "Refund liability shall be calculated on the reasonableness of the rates as determined by the rules in effect during the period under review by the franchising authority or the Commission." The Third Reconsideration order, issued the same date as the Revised Benchmark order, clearly indicates that the Revised Benchmark rules will be applied prospectively and that rules and formulas of the Rate Order will apply to determine refunds for the period before then. Specifically, the Commission provided that, for the period beginning September 1, 1993:

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[31]See, e.g., Illinois Bell Telephone Co. v. FCC, 966 F.2d 1478, 1482 (D.C. Cir. 1992), and cases cited therein.

[32]Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation; Buy-Through Prohibition, "Third Order on Reconsideration," MM Docket Nos. 92-266 and 92-262 (Released March 30, 1994).

[33]47 C.F.R. § 76.942(c)(3).

> Any refund liability for this period will be based, of course, on the rate-setting rules and formulas in effect at that time. The new rate-setting rules adopted in the companion Second Order on Reconsideration [Revised Benchmark Order] will be applied prospectively only. The new rules will determine future rates and refund liability only after the effective date of those rules.[34]

For these reasons, the Commission should stand by its pronouncement in the Rate Order that A La Carte offerings should be encouraged. In the Commission's words, TKR "should be free to offer collective offerings at a combined price which is less than the sum of the charges for the individual services."[35] As further demonstrated infra, TKR has benefitted its customers by increasing customer choices and by making its premium services more affordable.[36]

Because the BPU relied on factors other than those contained in the Rate Order for determining refunds for the period September 1, 1993 to May 15, 1994, and because TKR is in full compliance with Rate Order requirements, its orders requiring refunds for that period should be reversed.

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[34]Third Reconsideration at ¶ 109; see also Illinois Bell Telephone Co. v. FCC, 966 F.2d 1478, 1482 (D.C. Cir. 1992).

[35]Rate Order, 8 FCC Rcd at 5837, ¶ 327.

[36]Id.

4. Requirements of the March 30, 1994 Revised Benchmark Order

In the March 30, 1994 Revised Benchmark Order,[37] the Commission revised its standards for reviewing proposed A La Carte service offerings. Most importantly, the Commission adopted fifteen factors, or guidelines, for evaluating whether A La Carte service packages should be regulated or not regulated. Five of these factors support nonregulation. They are:

(1) the operator had offered (or begun to explore offering) "a la carte" packages consisting of non-premium channels prior to rate regulation;
(2) the operator has conducted market research that suggests introducing an "a la carte" package would be profitable, other than as a means of evading rate regulation;
(3) the subscriber is free to select which channels will be included in the package;
(4) subscribers are given notice that fully discloses their options, as well as fully discloses the total price (including related equipment charges) associated with exercising any of these options; and
(5) an insignificant percentage or number of channels in the package has been removed from regulated tiers.[38]

The other ten of these factors indicate actions which may be impermissible and which might lead to regulation. These ten are:

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[37] Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, "Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking," MM Docket No. 92-266 (Released March 30, 1994) ("March 30 Revised Benchmark Order" or "March 30 Order").

[38] March 30 Revised Benchmark Order at ¶ 196.

(1) the introduction of the "a la carte" package results in avoiding rate reductions that otherwise would have been required under the Commission's rules;
(2) a significant percentage or number of channels in the package were removed from regulated tiers;[39]
(3) the package price is so deeply discounted when compared to the price of an individual channel or the sum of the prices of the individual channels that it does not constitute a realistic set of service choices because subscribers will not have any realistic options other than subscribing to the package;[40]
(4) the channels taken from regulated tiers have not traditionally been marketed "a la carte";
(5) an entire regulated tier has been eliminated and turned into an "a la carte" package;
(6) the subscriber must pay a significant equipment charge to purchase an individual channel in the package;
(7) the subscriber must pay a "downgrade charge" (an additional charge) to purchase an individual channel in the package;
(8) the "a la carte" package includes channels that were removed from lower tiers of channels, so that subscribers to those lower tiers are required to buy one or more intermediate tiers in order to receive the same channels;
(9) subscribers are automatically subscribed to the "a la carte" package through, for example, such means as negative option billing; and
(10) the affected programmers object to the restructuring of their services into "a la carte" packages.[41]

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[39]The Commission indicated that for this factor, "regulators may consider whether including some previously regulated channels may be necessary for the successful marketing of the new package." March 30 Revised Benchmark Order at ¶ 196, n.267.

[40]The Commission indicated that to determine whether a package is deeply discounted, the Commission may look at "traditional discounting practices" of the cable industry. March 30 Revised Benchmark Order at ¶ 196, n.268.

[41]March 30 Revised Benchmark Order at ¶ 196.

Several other matters regarding A La Carte offerings were discussed by the Commission in the March 30 Revised Benchmark Order and should be mentioned. First, as a general matter the Commission noted that numerous operators had restructured their service offerings so that channels previously regulated were now being offered A La Carte.[42] Numerous Letters of Inquiry were issued by the Commission in response. In the March 30 Order, the Commission restated its belief that **"the public interest will be served by generally permitting nonregulated treatment of collective offerings of 'a la carte' channels,"** but added that the public interest would only be so served "if the offering enhances consumer choice and does not constitute an evasion of rate regulation."[43] TKR's offerings clearly increase consumer choice and, as demonstrated below, do not constitute rate evasion.

Second, the Commission retained the two-part test for determining whether collective offerings should remain unregulated, stating that no regulation will result from such restructuring as long as: "(1) the price for the combined package does not exceed the sum of the individual charges for each component of service, and (2) the cable operator continues to provide the component parts of the

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[42] March 30 Revised Benchmark Order, at ¶ 193.

[43] Id. at ¶ 194 (emphasis supplied).

package to subscribers separately."[44] The Commission added that "[t]his latter safeguard will be met if the 'a la carte' offerings constitutes a realistic service choice."[45] As discussed infra, TKR's A La Carte offerings appear to satisfy each of these conditions.

The third additional matter of interest in the March 30 Order is the Commission's statement that to determine whether collective A La Carte offerings should be regulated or unregulated, the Commission will consider in each case "whether consumers are being offered a greater variety of programming choices and options and whether the price for those choices is generally increasing or decreasing from previous levels."[46] As discussed infra, TKR's customers were provided an opportunity to lower considerably their cost of monthly cable service through better choices of programming service.

[44] March 30 Revised Benchmark Order at ¶ 194.

[45] Id.

[46] March 30 Revised Benchmark Order at § 195.

5. TKR Satisfies the Five Factors (or Guidelines) Indicating that Regulation is not Appropriate

(1) <u>the operator had offered (or begun to explore offering) "a la carte" packages consisting of non-premium channels prior to rate regulation</u>;

Prior to rate regulation, TKR had been exploring ways in which customers on its system could better be served via TKR's service offerings. As a result of market surveys, TKR learned that customers were interested in having greater control over the services they could obtain and in limiting their exposure to high-priced services. In this regard, TKR had learned that certain customers wanted the capability to opt out of carriage of certain high-priced services, especially those that carried sports or children's programming. Apart from exploring these customer concerns, TKR had entered into negotiations with programmers, especially Madison Square Garden ("MSG") and Disney, to carry their services to a broader portion of its customer base. A La Carte carriage was considered the most viable solution to this goal. In these ways, TKR began exploring the possibility of offering A La Carte packages consisting of non-premium channels prior to rate regulation.

(2) <u>the operator has conducted market research that suggests introducing an "a la carte" package would be profitable, other than as a means of evading rate regulation</u>;

Market research was performed by TKR, which indicated that it would make good business sense, as well as provide substantial benefits to customers, for TKR to begin offering certain specialty programs on an A La Carte basis. The market research indicated that TKR's customers were interested in greater choice and flexibility in their programming selections. TKR reasoned that if programs holding a specific interest for certain audiences were removed from regulated tiers and offered separately instead to those customers interested in these programs, TKR's customers would be better satisfied with their cable service. Not only would customers enjoy independent control over the services they purchase, they would also be placed in a position to lower their cable bills if they chose not to subscribe to these A La Carte services. TKR believed at the time and continues to believe that maintaining customer satisfaction and loyalty is a sound and profitable business practice.

(3) <u>the subscriber is free to select which channels will be included in the package</u>;

TKR's customers are free to select which channels will be included in the package. This is true for both TKR's premium services and for its A La Carte services. TKR's A La Carte offerings permit customers to purchase separately any combination of the four services. On the Hamilton system, each of these channels is priced at $0.85. If all four channels are purchased, the total package price is $3.25 per month,[47] or $0.15 less than the combined price. The rates charged by the other systems are comparable, and each permits the customer to purchase the channels individually.[48] This is consistent with the way TKR offers its traditional premium services (HBO, Cinemax, The Disney Channel, SHOWTIME, PRISM, and ENCORE). Rates for these services are structured so that a discount applies on any premium channel purchased after the first.

(4) <u>subscribers are given notice that fully discloses their options, as well as fully discloses the total price (including related equipment charges) associated with exercising any of these options</u>;

TKR's rate card effective August 31, 1993 for Hamilton fully discloses the total price (including related equipment charges) associated with exercising any option available to subscribers. Hamilton's rate card is typical of the notice provided by TKR for all the systems reviewed by the BPU. In each case, full notice is given of the total price, including equipment charges, for the A La Carte options. <u>See</u> the attached Hamilton rate card.

[47]The BPU mistakes this number for $3.24/month.

[48]A breakdown of the A La Carte offerings of each system under review is appended at Attachment C.

(5) an insignificant percentage or number of channels in the package has been removed from regulated tiers.

The channels removed by TKR from its service tiers and transferred to A La Carte represent an insignificant number of channels.

In the case of TKR's Hamilton system, The Discovery Channel, TNT, CNBC/MSG (a shared channel), and American Movie Classics were previously tiered by TKR and were offered on an A La Carte basis for the first time on August 31, 1993. Prior to August 31, 1993, TKR offered a total of 22 channels of cable programming service beyond basic service. Only four (4) of these 22 channels were removed from cable programming services tiers to A La Carte. The four channels removed from TKR's cable programming service tiers represent only 18% of the cable programming services offered by TKR. It bears mentioning that the four channels removed were among the more expensive channels on the existing cable programming service tiers, and were channels that historically have shown the greatest amount of cost volatility. Furthermore, the removal of four channels to A La Carte packages is consistent with safe harbor recommendations made by the National Cable Television Association, which were recently reported to have been agreed to by the Commission.[49]

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[49]See Pasdeloup, Going Forward, a la Carte Rules On Hold at FCC Until Oct. 13, Cable World, August 22, 1994, at 31.

The Commission has indicated that "regulators may consider whether including some previously regulated channels may be necessary for the successful marketing of the new package."[50] TKR's decision to remove selected channels, all appealing to identifiable customer niche interests, is consistent with a successful marketing strategy.[51]

6. The Ten Factors (or Guidelines) Indicating Regulation may be Appropriate do not Support Regulation of TKR's A La Carte Offerings

(1) <u>the introduction of the "a la carte" package results in avoiding rate reductions that otherwise would have been required under the Commission's rules</u>;

TKR's rates for regulated service were reduced even though some services were removed to A La Carte. TKR's regulated rates decreased overall as a result of its restructuring. TKR's revenues have likewise declined as a result of restructuring, including not only regulated revenues, but TKR's revenues overall.

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[50]March 30 Revised Benchmark Order at ¶ 196, n.267.

[51]While TKR would have liked to add completely new and additional channels to be offered A La Carte, it was precluded from doing this because of severe limitations on channel capacity, exacerbated by the concomitant implementation of the new must-carry rules. Specifically, all available "extra" channel space was needed to accommodate mandatory carriage requests by "local" television broadcast stations. It continues to be TKR's expectation that it will be able to generate sufficient cash flow to merit expansion of the systems' existing channel capacity. Such expansion would permit adding previously unoffered services on an A La Carte basis.

More importantly, TKR's regulated services after August 31, 1993 complied with the Commission's benchmark requirements. As a result of TKR's restructuring activity, those customers who elected not to receive TKR's A La Carte services benefitted from a reduction in their rates.

(2) a significant percentage or number of channels in the package were removed from regulated tiers;[52]

A significant percentage was not removed, as discussed supra. In the case of Hamilton, for instance, only 4 out of 22 services were moved from regulated service tiers, and none of these was from basic. Similarly, the other TKR systems at issue have only a small percentage and number of channels removed from regulated tiers.[53]

(3) the package price is so deeply discounted when compared to the price of an individual channel or the sum of the prices of the individual channels that it does not constitute a realistic set of service choices because subscribers will not have any realistic options other than subscribing to the package;[54]

TKR's A La Carte channels realistically permit customers to purchase each of the four services comprising

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[52]The Commission indicated that for this factor, "regulators may consider whether including some previously regulated channels may be necessary for the successful marketing of the new package." March 30 Revised Benchmark Order at ¶ 196, n.267.

[53]Elizabeth (3 of 32 total regulated channels); Old Bridge (5 of 36); Ramapo (5 of 37); Rockland (5 of 42); Tri-System (5 of 37); Warwick (3 of 33); and Wildwood (4 of 35).

[54]The Commission indicated that to determine whether a package is deeply discounted, the Commission may look at "traditional discounting practices" of the cable industry. March 30 Revised Benchmark Order at ¶ 196, n.268.

the tier separately. In the case of Hamilton, for instance, each of these channels is priced at $0.85. If all four channels are purchased, the total package price is $3.25 per month. The package price therefor is not deeply discounted, and in fact is hardly discounted at all, since the total savings on channel prices is only $0.15 if all four channels are purchased. This $0.15 savings is a savings of only 5 percent, which is tiny compared with the approximately 40 percent discount TKR historically has provided for election of multiple premium channels. The situation regarding TKR's other systems at issue is similar to Hamilton's, as is clear from Attachment C.

Other facts regarding TKR's A La Carte offerings support the conclusion that TKR is providing customers with realistic service choices. On TKR's Hamilton system, TKR has for the first time provided customers with any choice at all of purchasing these channels separately. In addition, the four channels comprising this collective offering appeal to diverse interests, thus making it very possible that a customer will indeed select fewer channels than the full package. TNT and CNBC/MSG are sports-oriented channels. AMC appeals to "empty nesters" and Discovery to non-fiction fans. Significantly, customers on TKR's Hamilton system have in fact elected to receive three or less Value Plus channels. The fact that many customers find that the collective four-channel offering is a good value should not be counted against TKR. It is likely that the reason TKR's customers opt for all of the channels is because of the value of the channels to them, not because of some artificial pricing of the package.

Even if TKR's charge for an interdiction device is included in the analysis, as the BPU has done, this factor still reflects favorably on TKR's A La Carte offerings. For each of the systems at issue, TKR customers are offered at least one channel in the A La Carte package at a cost lower than the entire package cost, even including the cost of an interdiction device. The receipt of a single channel does constitute a realistic choice, especially given the diverse nature of the programming available on the channels delivered A La Carte. Consequently, as specifically required by factor (3), TKR's customers have a realistic option other than subscribing to the package.

TKR's premium services (HBO, Cinemax, The Disney Channel, SHOWTIME, PRISM, and ENCORE) comprise a second collective A La Carte offering on the Hamilton system. TKR applies a discount to any premium channel subscribed to after the customer has purchased one premium channel. The discounted rate charged for all premium services except ENCORE represents a $5.00 reduction (a 42%-45% discount) from the $11.00 or $12.00 original charge for that premium service. ENCORE is not discounted from its $2.95 original cost but instead is free of charge (a 100% discount) if three or more other premium services are purchased. Since in the case of TKR's premium services, only two services (not the entire package) need be subscribed to in order to receive a discount, the discounting of TKR's A La Carte offerings is thus consistent with the discounting of TKR's premium services. In fact, discounting of TKR's A La Carte offerings is considerably less deep.

(4) <u>the channels taken from regulated tiers have not traditionally been marketed "a la carte"</u>;

TKR had offered MSG and Disney on an individual, per channel basis on certain systems prior to regulation. Other cable operators have often offered MSG, Disney and American Movie Classics on an A La Carte basis. TKR offered CNN, CNBC, The Discovery Channel, TNT, TBS, and American Movie Classics on an A La Carte basis for the first time on August 31, 1993. TNT, TBS, CNN, and Discovery, although not traditionally offered on an A La Carte basis by operators, are relatively high-priced services and were removed from basic and cable programming service tiers in order to save money for those subscribing to those tiers that did not value this type of targeted programming.

(5) <u>an entire regulated tier has been eliminated and turned into an "a la carte" package</u>;

With the exception of Rockland and Ramapo, where WTBS was the only channel on the Superstation Tier, no entire tier of TKR has been eliminated and turned into an A La Carte package. In the case of Hamilton, for instance, The Discovery Channel was removed from the Advantage Plus tier, which at the time consisted of ten (10) channels. CNBC/MSG, TNT, and American Movie Classics were previously offered on the Advantage tier, which at the time also consisted of ten (10) channels.

(6) <u>the subscriber must pay a significant equipment charge to purchase an individual channel in the package</u>;

TKR's A La Carte program permits customers to purchase each of the four services separately. For the Elizabeth system, no equipment fee is charged. On the Hamilton system, each of these channels is priced at $0.85, and if less than all four channels are purchased, an additional $1.50 equipment charge is added to pay for TKR's interdiction device.

TKR's interdiction device is necessary in order for TKR to offer its customers the choice of receiving less than all four of the A La Carte channels, and was selected by TKR for sound business planning purposes. The interdiction device offers denial-type security which should prove the most cost effective option as A La Carte grows in popularity and expansion occurs. Furthermore, the interdiction approach provides TKR with the ability to control customer usage of as many as 30 channels per device, thus providing TKR with the ability to offer more services A La Carte.

As far as other options are concerned, TKR's system is unable technically to support non-denial security options, such as the addition of two to three negative traps, without customers suffering a significant loss in signal quality. Addressable converters also are not an option, since the cost of such equipment to customers would be greater than the cost of the interdiction device. The interdiction device is a better alternative because: (i) it results in no loss in signal quality; (ii) it is relatively inexpensive; and (iii) unlike addressable converters, which continue to be needed (and paid for) if all premium services are purchased, the interdiction device is not required to be used when all of the Value Plus channels are purchased.

Compared with the $2.41 addressable converter charge on the Hamilton system necessary to receive any one or more of TKR's Premium Services, the $1.50 equipment charge is small. Yet assessing an additional charge for equipment like an addressable converter is commonplace and widely accepted in the cable industry as a necessary charge for receiving A La Carte services.

The use of interdiction equipment is also far more consumer-friendly than the use of addressable converters. With an interdiction device, consumers are able to use existing remote control devices for their televisions. Moreover, special features of their television, such as picture-in-a-picture, are not disabled as they would be if an addressable converter were used. This additional consumer-friendliness of interdiction devices has been mandated by Congress and is consistent with Section 76.630 of the Commission's rules and regulations. Addressable converters are neither as consumer-friendly, nor do they as easily fulfill the mandates of Congress and Section 76.630.

Finally, TKR notes that the cost of the interdiction device was reached using the equipment charge formula developed by the Commission. Also, the cost of the interdiction device will remain virtually unchanged over time, even as more channels become available through interdiction security.

(7) <u>the subscriber must pay a "downgrade charge" (an additional charge) to purchase an individual channel in the package</u>;

TKR has no downgrade charges.

(8) <u>the "a la carte" package includes channels that were removed from lower tiers of channels, so that subscribers to those lower tiers are required to buy one or more intermediate tiers in order to receive the same channels</u>;

Factor No. (8) does not reflect negatively on TKR's A La Carte offerings. For instance, the August 31, 1993 rate card for Hamilton indicates that customers to an A La Carte service must be customers of both Broadcast Basic and Advantage before they can subscribe to Value Plus. However, since these four services were previously offered on the Advantage and Advantage Plus tiers, as opposed to the Broadcast Basic or Super Station tiers, it appears that they were not removed from lower tiers of channels, but rather from tiers which were on the same intermediate level.

The situation is similar for TKR's other systems at issue. As discussed <u>supra</u>, the BPU erred in all of its orders except Tri-System, Old Bridge and Elizabeth by stating that one or more of TKR's A La Carte offerings was removed from the basic service tier. For Tri-System (which includes Old Bridge) and Elizabeth, the WTBS station is the only A La Carte offering removed from the basic tier.

(9) <u>subscribers are automatically subscribed to the "a la carte" package through, for example, such means as negative option billing</u>;

TKR has restructured its A La Carte service offerings consistent with FCC procedures.

(10) <u>the affected programmers object to the restructuring of their services into "a la carte" packages</u>.

TKR has obtained the consent of all programmers to the restructuring of their programming into the A La Carte packages. In fact, TKR felt it was critical to limit service selected for this A La Carte treatment to those which had consented to such delivery.

7. Final Considerations

The Commission indicated in the March 30 Revised Benchmark Order that when it weighs these fifteen factors, or guidelines, "[n]o single factor will necessarily be dispositive in any case." The Commission instead will assess "the totality of the circumstances" to determine if the cable operator's A La Carte offering "intentionally, or in effect, constitutes an evasion of rate regulation."[55]

For an evaluation of TKR's A La Carte offerings for the period subsequent to May 15, 1994, the "totality of the circumstances" must include, <u>at the very least</u>, the entire set of fifteen A La Carte factors (and other considerations) offered by the Commission and a thorough, complete analysis of each of these considerations. The "totality of the circumstances" should also include due regard for TKR's valid business reasons for offering A La Carte services in the manner selected. It is evident that the BPU failed to consider the "totality of the circumstances" in making its determination that TKR has evaded rate regulation with its A La Carte offerings. For this reason, the Commission should reverse the BPU's orders on appeal.

C. The Treatment of TKR's A La Carte Offerings by the BPU is Grossly Unfair Compared with its Approval of Adelphia's A La Carte Offerings.

For additional evidence of the unreasonable, arbitrary nature of the BPU's orders, TKR requests the Commission to compare BPU rulings on TKR's A La Carte offerings with its order approving the A La Carte offerings of Adelphia Cable Communications. The Adelphia order, dated the same as the TKR orders, is attached as Attachment D.

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[55]March 30 Revised Benchmark Order at ¶ 196.

In contrast with the 3-5 A La Carte channels created by TKR's A La Carte proposals, Adelphia's A La Carte proposal created 34 A La Carte channels. Of these, three were new programming services and the remaining 31 were removed from Adelphia's cable programming service tiers. According to the BPU, only 23 regulated channels remained following this restructuring, and all of those were regulated by the BPU as basic service tier channels. Thus, entire programming service tiers were eliminated by Adelphia and transformed into A La Carte offerings.

Adelphia's proposal also contained charges for interdiction devices that are well in excess of TKR's $1.50 charge. Adelphia's original charge for this device was $6.00, which was reduced to $3.25 on August 3, 1994.[56] As is the case with TKR's systems (except Elizabeth), in order to receive even one A La Carte channel, the interdiction device must be rented. Thus, to receive only one of the several low-cost, $0.10/month channels on the Adelphia system, the customer originally was required to pay $6.10/month, and after August 3, 1994, $3.35/month. It bears mentioning that although not clear from the order, the channels offered by Adelphia for $0.10/month obviously are not popular channels. Unlike the orders it issued for TKR's systems, the BPU brushed off this interdiction device charge

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[56]BPU Adelphia order at 2.

with a lengthy, enthusiastic discussion of the utility and value of interdiction devices:

> 4.) Additionally, while there is a monthly equipment lease fee associated with the selection of individual a la carte channels, the cost ($3.25) is comparable to that of an addressable converter. Staff believes that the relatively low cost is significant in that the technology employed (interdiction) is advanced compared to addressable converters, represents a good value to subscribers, and is far more consumer friendly as discussed below.
>
> Petitioner has selected interdiction technology as a means of offering a la carte channels to subscribers. The Office of Cable Television (OCTV) has commented extensively on this topic in connection with the FCC's proposed rulemakings regarding Consumer Electronics and Cable System Compatibility, implementing Section 17 of the 1992 Act. The OCTV has taken a position advocating the use of "in-the-clear" technologies such as interdiction, which completely eliminate problems with consumer electronic equipment, and are transparent to subscribers.
>
> While a subscriber who is required to use a converter for descrambling purposes may require several units to perform advanced functions or serve several televisions, only one interdiction device is required for all sets in a household. Thus, use of an interdiction device may serve to eliminate extra charges for multiple converters.[57]

The Adelphia system at issue also assessed a downgrade charge to reduce service to basic service. While the BPU, to its credit, recognizes that the existence of Adelphia's downgrade charge is a factor weighing in favor of regulation, that consideration was also conveniently brushed

[57]BPU Adelphia order at 6-7.

aside.[58] Finally, the numerous other factors developed by the Commission for evaluating A La Carte offerings are conveniently neglected in the Adelphia order, as they were in the TKR orders.[59]

In short, the ease with which Adelphia's noncompliance with certain A La Carte factors was dismissed by the BPU contrasts sharply with the BPU's rigid application of a select few of these factors in the case of TKR. In both cases, the BPU failed to engage in a thorough analysis of all A La Carte considerations. In the case of Adelphia, a thorough analysis might in the end have caused the BPU to reach a similar conclusion that regulation of its A La Carte offerings is not appropriate. In the case of TKR, however, the BPU's incomplete analysis begs for a reversal by the Commission of the BPU's orders.

D. TKR is Entitled to use 121.8 as its Inflation Adjustment.

The BPU found in its orders that the "correct" inflation adjustment TKR should have used is 122.5, instead of the 121.8 used by TKR. The BPU is mistaken.

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[58] BPU Adelphia order at 6.

[59] The importance of obtaining programmer consent to the A La Carte offering, for instance, provides a striking contrast between TKR and Adelphia. As explained supra, TKR felt it necessary to obtain the consent of each programmer prior to making an A La Carte offering. Adelphia, in comparison, includes many channels of which programmers object to A La Carte offerings.

The BPU based its decision on the Public Notice issued by the Commission on November 10, 1994. By basing its decision solely on the November 10, 1994 Public Notice, the BPU ignores prior and subsequent pronouncements on this issue indicating that TKR is permitted to employ the figure 121.8 as the 3rd Quarter 1992 GNP-PI figure in Line 123 of Form 393 instead of 122.5. As the Commission's exhaustive treatment of this issue reveals, the 121.8 figure, employed by TKR in a good faith effort to comply in a timely manner with the Commission's restructuring requirements, is an appropriate figure to use in these calculations.

The November 10, 1993, Q&A information sheet cited by the BPU addressed this issue of the proper number to include in Line 123. In Question No. 9 of this Q&A, the Commission noted that on August 31, 1993, the Department of Commerce updated the GNP-PI figure for the third quarter of 1993. The response to Question 9 states that the updated figure, 122.5, should be used for Line 123 rather than the 121.8 figure printed on the Form and in the Instructions. The Commission again did not modify Form 393 itself.

On March 30, 1994, the Commission released its <u>Third Order on Reconsideration</u> in Docket Nos. 92-266 and 92-262. ("<u>Third Reconsideration</u>"), providing guidance on this issue. Noting that certain rate-setting facts, including the inflation adjustment, had become definite during the time between when certain operators had revised their rates